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Supreme Court of the United States

OCTOBER TERM, 1954.

MASTRO PLASTICS CORP. and FRENCH-AMERICAN REEDS MANUFACTURING CO., INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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The Intermediate Report of the Trial Examiner is unreported and is printed in the Record at page 266. The prevailing opinion in the National Labor Relations Board is part of its Decision and Order reported in 103 NLRB (No. 51) at page 511 and is also printed in the Record at page 339. The opinion of the dissenting Board Members is at 103 NLRB 520 and is also printed in the Record at page 353. The opinion of the Court of Appeals printed in Record, p. 363, is reported at 214 F. 2nd 462; dissent at page 466. A petition for rehearing in that Court was denied without opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254(1). The undated decree of the Court of Appeals was entered on August 19, 1954 (R. 373), after denial of a petition for rehearing (R. 370). By order of Mr. Justice Clark (R. 377) time for filing petition for a writ of certiorari was extended to November 27, 1954. Petition for the writ was filed November 19th, 1954 and granted January 10, 1955 (R. 377). 348 U. S. 910.

Questions Presented.

1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act, which bars employees who strike during the "cooling-off" period following the giving of notice of intent to terminate or modify a collective contract from representation proceedings (Sec. 9) from protection against subsequent unfair labor practices (Sec. 8) and from relief thereafter against unfair labor practices through the enforcement machinery of the Board (Sec. 10), is operative against unfair labor practice strikers.

2. Whether employees who strike against unfair labor practices during the term of a collective labor contract containing a covenant against "any strike", may be ordered reinstated.

Statutes Involved.

As to Question 1, the statutory provision involved is Section 8(d) of the National Labor Relations Act as amended, 61 Stat. 136, 140; 29 U. S. C. §§151, 158(d). The text is:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation

of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

As to Question 2, the statutory provision involved is Section 13 of the National Labor Relations Act as amended, 61 Stat. 151, 29 U. S. C. §163. The text is:

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Collaterally involved as to both questions are two sections definitive of the term "strike" in the amending Act, the Labor Management Relations Act of 1947 (61 Stat. Title V, Section 501(2), 502; 29 U. S. C. Sec. 142 (2), 143). The texts, so far as material are:

SECTION 501. DEFINITIONS

"When used in this chapter—(2) The term 'strike' includes any strike or other concerted stop-

page of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

SECTION 502. SAVING PROVISIONS

"* * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

Statement.

Petitioning employers operate a plant in New York City at which there was in effect a collective-bargaining contract between them and Federal Labor Union No. 22045 A. F. of L. expiring November 30, 1950 (R. 253). The contract contained the following covenant (R. 255):

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

In August of 1950, an organizational drive was undertaken by a Local 65 of the Wholesale and Warehouse Workers Union (R. 274) among petitioners' employees and that Union filed with the N. L. R. B. on September 28th a petition for certification. Petitioners admittedly opposed the organizational drive of Local 65 on the ground that it was communist-controlled but believed that the incumbent Local 22045 was too weak to cope with Local 65 (R. 274).

Petitioners therefore got in touch with a third union, Local 318 of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, a union which had previously defeated Local 65 (R. 274), and brought about a series of meetings between the officials of Locals 22045 and 318 wherein it was proposed that the bargaining agency of the unit be transferred from the incumbent to Local 318 (R. 275). The incumbent, 22045, ultimately rejected the proposals for a voluntary transfer of the bargaining agency (R. 276). Thereafter petitioners, it is found, commencing on Friday, October 20th and terminating during the week of October 23rd (R. 278-286) supported an organizational drive among the employees to displace Local 22045 as their bargaining agent and to substitute Local 318 by prompting certain employees to engage in such a campaign, soliciting others to engage therein, assisting in the campaign and paying certain employees for time devoted thereto. On October 24th, Local 318 intervened in the pending certification proceeding before the N. L. R. B. wherein Local 65 was the petitioner (R. 285).

Meanwhile the incumbent Local 22045, which, somewhat prematurely in the light of contract provisions and statutory requirements, perhaps because of the activities of Local 65, had on September 7th, 1950 demanded a wage increase of 12½¢ per hour (R. 275), served the statutory notice of termination or modification on October 10th, 1950 (R. 340). Then on October 20th it increased its wage demand to 25¢ per hour and added a demand for a 3% welfare fund (R. 277). On October 23rd it adopted a resolution to transfer its affiliation to a fourth union, Local 3127 of the Carpenters Union, A. F. of L.* The stated reasons for the transfer

* The prevailing opinion in the Court of Appeals treated Local 22045, the incumbent bargaining agent and Local 3127 as a single entity.

were that Local 3127, which had the same business representatives as Local 22045 and shared its office (R. 271) was better equipped to administer the demanded welfare fund and could better resist the raiding of Local 318 because it had the support of the Carpenters International, A. F. of L. (R. 287).

The notice of the increased monetary demands and the welfare fund demand together with the advice that the members of Local 22045 had determined to switch their allegiance to Local 3127 were, it is found, communicated to petitioners at a conference of October 25th (R. 288). Incongruously, however, on October 31, Local 22045 appeared in the pending representation proceeding and declined to consent to an election, stating its intention to file unfair labor practice charges which it actually filed on November 2nd (R. 288).

Between October 23rd and November 10th, Local 3127 was soliciting employees to become members. One of the solicitors was the employee Ciccone, a machine shop man (R. 290).

On the morning of Friday, November 10th, petitioners posted a notice to the effect that a rumor of a strike to be called the following Monday had reached them and warning employees that a strike would be treated as a breach of contract and cause for replacement (R. 289).

In the early afternoon of that day, November 10th, Petitioners' President, Maccaferri, leaving the plant to attend a directors meeting, (R. 294) had a conversation with Ciccone wherein, it is found, he accused the latter of soliciting membership for Local 3127 in the plant in the course of his duties, which were of roving character, and he ordered Ciccone to confine his work to the machine shop (R. 292). At 2:50 P. M. Ciccone, with some other machinists, left the machine shop and went to the molding room for the purpose of obtaining Coca Cola from the dispenser

in that department. En route he, with the others passed through the packing room. Mrs. Maccaferri, a supervisor in the packing room, reported by telephone to her husband, Petitioners' President, then at the directors meeting downtown, that Ciccone was out of his department. Maccaferri called Ciccone's foreman and the Personnel Manager of the plant and ordered them to discharge Ciccone which they did forthwith (R. 293-295).

Within ten minutes of Ciccone's discharge, the other employees of the machine shop walked out on strike (R. 295). Ciccone and another machinist, Pieroni, shouted to an employee in the buffing room of the finishing department a request to join them on the picket line and the men in that department complied in a group (R. 298). The picket line was established by Saul, a representative of both Local 22045 and Local 3127, but under the auspices of the latter union (R. 297). Some, but not all of the employees in the remaining departments, joined the picket line before the end of the day shift (R. 297, 299). On the following day, Saturday, November 11th, some employees reported for work across the picket line but thereafter there was a complete shutdown of the plant until December 11th (R. 304).

Maccaferri's discharge of Ciccone was based, it is found, upon a mistake of fact (R. 316). Ciccone was not prohibited by the order given him in the early afternoon, even as that order was construed by Maccaferri, from going to the Coca Cola dispenser. Neither the Union nor Ciccone ever brought the discharge to arbitration however (R. 305), despite the contract provision (R. 261) providing for review of discharge on the issue of whether "proper cause" existed therefor. All who walked out or failed to return to work, it is found, did so to protest Ciccone's discharge or because they respected the picket line (R. 318). Saul, the representative of 22045 and 3127 stated on November

11th, the day after the strike began, that the reinstatement of Ciccone was the only issue at that time (R. 304). No other issue was thereafter raised.

The demands which Local 22045-3127 was, at the time of the strike, negotiating included a proposal for a change in the discharge review provision of the existing contract to the effect that arbitral review of the cause for discharge should precede rather than follow the discharge (R. 265, Exh. 3 Demand 2, in evid. R. 74).

During this entire period, from September 28th to the last week in December (R. 306), the petition of Local 65 was pending undetermined before the Board.

On December 11th, more than sixty days after service of the notice of modification or termination, the plant reopened with a group of employees who then crossed the picket line and notice of discharge for breach of contract was sent to all employees who had failed to return to work (R. 305-306). No arbitration was instituted upon those discharges. It was not until March 12, 1951 that the dischargees, about seventy in number, gave notice through Local 3127 that they offered unconditionally to return to work (R. 350, corr. R. 307).

The contract (R. 253 254) provided, *inter alia*, that

> "The Employers recognize and acknowledge the Union (Local 22045—counsel) as the sole collective bargaining agency for all of their employees, with respect to wages, hours, and conditions of employment."

Also that:

> "The Employers shall employ and retain in their employ * * * only employees in good standing with the Union, except for those jobs which are now exempt."

It also contained a clause requiring new employees to join the Union after the statutory grace period (R. 254); provided for discharge of Union delinquents and, rather unusually, provided for arbitral determination of questions arising out of union membership. A checkoff clause was also included (R. 254, 255) and in addition to the no-strike clause quoted in the forepart of this statement a clause reading as follows (R. 255):

> "Either party may avail itself of the arbitration procedure as set forth in Section 19 (the arbitration clause—counsel) to obtain a determination of whether a strike, work stoppage, or lockout has occurred."

The arbitration clause (R. 259) covered

> "* * * differences * * * between either of the Employers and the Union or its members as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach * * *."

The discipline and discharge clause (R. 261) read:

> "The Employers shall have the sole right to discipline and discharge employees for proper cause, provided, however, that any disciplinary action or discharge may be subject to review in accordance with the procedure set forth in Section 19 (the arbitration clause—counsel), provided the matter is referred by the Union to the Employers within seven days of the date of discharge by the notice required in Section 19. In case of discharge, the Employers shall notify the Union within twenty-four (24) hours. The Employers may adopt such rules and regulations from time to time as they may deem necessary and proper for the carrying on of their businesses, pro-

vided the same are not inconsistent with any of the express provisions of this agreement. The term 'proper cause', as used in this section, shall include, but shall not be limited to, violation of any Employers' rule or regulation."

Petitioners declined to reinstate the discharged strikers and unfair labor practice charges were prosecuted by the Board. Petitioners raised two defenses, the only matters now in issue, viz., that the employees had lost their status as such by striking within the proscribed "cooling-off" period and that their strike in breach of contract was an unprotected activity.

In respect of the "loss of status" defense the Board majority, overruling the defense, held (R. 348) that Section 8(d)

> ". . . applied to economic strikes and strikers rather than, as here, to an unfair labor practice strike called and continued for issues apart from negotiation of a new or revised contract."

In respect of the breach of contract defense, the Board majority held that the strike was not a breach of the contract since it was in protest of (R. 344)

> ". . . matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the (petitioners)."

The "matters which constituted serious violations of the Act" were, the Board found (R. 340, adopting R. 313):

> (a) inducing and encouraging the representatives of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representatives of Local 318 to engage in a campagin to displace

Local 22045 as the bargaining agent of (petitioners') employees;

(c) sponsoring, supporting and assisting the organizational campaign of Local 318;

(d) giving financial rewards to employees active in the organizational campaign of Local 318;

(e) inducing employees by threats, warnings of reprisal and promises of benefits to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions;

and also (R. 316)

". . . discharging Frank Ciccone on November 10, 1950. . . ."

The prevailing opinion in the Court of Appeals (R. 364) sustained the Board on both points.

The order of the Board, in addition to the usual cease and desist provisions, provided for the reinstatement of Ciccone and seventy-eight strikers. The reinstatement provisions of the order, as enforced by the decree below, are the provisions assailed upon this writ.

The jurisdiction of the Board to entertain the unfair labor practice charges rests upon the proven and conceded engagement of petitioners' plant in interstate commerce (R. 269, 270). It is to be noted, however, that the "loss of status" defense goes to the jurisdiction of the Board, which fact may have a bearing on the authority of a reviewing court.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10(e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit (R. 269).

Summary of Argument.

A. The Loss of Status Question.

There is no ambiguity in the loss of status clause. It sets up a temporal standard of conduct and its coverage of employees is universal. Its language reveals that it was drawn with an eye to the definition of "employee" in Section 2(3) which definition expressly comprehends the victims of unfair labor practices. The word "strike" in the clause is defined in Section 501 LMRA, to be a universal concept. If Congress meant the loss of status clause to be limited, it made at least three distinct language "errors". This is improbable; the concurrence of broad terms is intentional and bespeaks a cessation of industrial strife whatever its source.

The language of the loss of status clause is selective. It leaves the striker with his rights under Section 7 which must be respected negatively in other tribunals. Its only effect is to bar the striker from access to NLRB remedies until re-employment; it gives the employee an election between the strike remedy and the Board remedies but does not penalize him further.

The inclusion of Section 9 in the loss of status indicates a design to restrain strikes concerned with representation issues, particularly the recognition strike, which the Conference Committee expressly condemned (Report, Appendix 52). Congress intended that at least some unfair labor practice strikers were to be denied the right to vote, for it struck out of the proposed legislation a clause permitting them to vote (Rep't Appendix 59).

The inclusion of Section 8, the unfair labor practice Section, in the loss of status presupposes that the striker would be the victim of an unfair labor practice; the inclu-

sion of Section 10, the procedural Section, presupposes that unfair labor practices had been committed against him prior to the strike. There is nothing to indicate a distinction between the unfair labor practice connected with the strike and any other; such a distinction would be illusory in practice. If such a distinction can be made, the loss of status clause would be superfluous, for Congress had clearly, in Section 8(d)(4) made the strike of an incumbent agent to change working conditions an unfair practice and recognized that employees supporting such efforts would lose status completely; it struck out as superfluous proposed provisions accomplishing a loss of status in the case of those who struck in support of unfair labor practices (Conf. Rep't, Appendix 55). The loss of status clause was left in the Act because it accomplished a broader purpose than the rejected clauses.

Congress realized that the stresses of renegotiation are not merely bi-lateral but multi-lateral, embracing the employer, the incumbent union, the rival union, the dissidents within the incumbent union. Congress had to protect those who followed its prescribed processes for orderly resolution of renegotiation problems from disruptive tactics by any of the other interests. It consequently adopted the device of excluding from those processes those whose strike rendered the processes unworkable, whatever their objective or excuse for striking. This is reasonable, for if the strike, by its success, proves to be an efficacious remedy the striker loses nothing; but if it fails the striker chose the inefficacious remedy and thereby disrupted the orderly remedy; he may not later resort to the peaceable remedy which he first rejected as inefficacious.

The language of the loss of status clause is unambigious, deliberately chosen, consonant with the legislative history and functionally correlated to the objective of peaceful contract renegotiation.

The opinions below are based on the argument that since Section 8(d) is concerned only with contract renegotiation, the loss of status clause is limited to strikes to terminate or modify a contract. It involves the obvious fallacy that only negotiation strikes interfere with negotiation. Labor Board Cases 301 U. S. 1, 42. That Congress found it necessary to deal with the individual employee as such indicates that it recognized him to be a problem separate from the problem of the incumbent union and with interests not always coincident with those of the incumbent.

The argument below, narrowing the term "employee" to one who strikes for economic changes in the renegotiation period implies that an employee may strike for economic changes at any other time, an implication at variance with the obvious intent of Section 8(d) as a whole. The loss of status clause is meaningful only if it refers to strikes permissible at any other time.

There is no repugnancy between the loss of status clause and the remainder of Section 8(d); rather they are organically related if the loss of status clause is read literally. As read by the Board and the Court below the clause is superfluous.

B. The Contract Question.

The contract contained a "no-strike" clause unlimited on its face and unambiguous.

The Board, construing the no-strike clause as limited in its application to matters specifically foreclosed in the writing and stating that the strike was "a protest against unfair labor practices apart from the terms, meaning and application of the contract" holds that even the unlimited "no-strike" clause did not make the strike a breach of the contract.

The character of the employer's acts as unfair labor practices is irrelevant to a determination of the coverage of a no-strike clause, for Section 13 provides that the Act shall not be construed to affect any limitation or qualification placed upon the right to strike. The six acts of the employer found by the Board may be summed up as aiding a union, Local 318, rival to the incumbent Local 22045 in an effort to displace the latter. One of the acts was the discharge of an employee.

An examination of the contract shows that the status of the incumbent was secured by specific provisions. The recognition clause protected Local 22045 against substitution of Local 318; union shop terms prevented membership defections; checkoff and delinquency discharge provisions protected the dues of Local 22045. Whether there was proper cause for the discharge was reviewable by arbitration. The acts charged against the employer which, cumulatively, caused the strike were, thus, items specifically covered by the contract terms. The Board's conclusion, then, falls on its own premise and its own findings. It is evident that the Board reached its conclusion as to contract coverage not by applying the standard of contract language but by applying the standard of whether the conduct breached the Act. The latter is contrary to Section 13.

The Board erred also in narrowing the scope of the no-strike clause to matters specifically foreclosed by the contract. If the law of New York be applicable as such, or as Federal law adopted by Congress, the controlling decision is *Matter of Western Union Tel. Co. (A. C. A.)*, 299 N. Y. 177 wherein it was held that a refusal to work, for reasons apart from the remaining terms of the contract, specifically, for the purpose of aiding fellow unionists in a strike in which the Western Union employees had no direct interest, violated an unlimited no strike clause.

If Federal law be applicable there appears to be no controlling decision. However it is clear from Section 13 that, in contract construction, the character of conduct as an unfair labor practice can play no part. The Board used the canon that a clause in derogation of the right to strike will be strictly construed. Such a canon is at variance with the major purpose of the Act which seeks to protect the flow of commerce free of strike interruptions by obtaining consensual derogation of the right to strike. The canon of construction then should be that the whole right to strike is yielded except as expressly or by fair implication reserved. Labor agreements are no longer purely private contracts; they are instruments of commerce to be construed *in favorem pacis* in the public interest. *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332 implies a canon of construction requiring express reservation to preserve the right to strike.

The Board's construction leads to the absurd result that demands withdrawn in bargaining and hence not expressed in the writing can be the subject of a valid strike during the contract term.

In any event Section 8(d) would prohibit a contractual arrangement preserving any part of the right to strike during the renegotiation period. *Penello (NLRB)* v. *UMW*, 88 F. Supp. 935, the "able and willing" case involving a strike for a non-contract purpose.

Argument.

I.

Employees who strike during the renegotiation period of a contract lose status for the enforcement purposes of NLRA even though they are unfair labor practice strikers.

There is no question but that factually, the strikers in the case at bar brought themselves within the literal purview of the loss of status clause of Section 8(d). They engaged in a strike within the sixty day period following the giving of notice of intent to terminate or modify and the strike occurred while the expiring contract was still in force. Nor is there any question raised that the status of any employee had been revived by reemployment.

The "loss of status" clause, read apart from the remainder of Section 8(d), is quite clear and unambiguous; the ambiguity which controlled the prevailing opinions below was not attributed to any want of definiteness in the "loss of status" clause itself but was imported from the remainder of Section 8(d). Nonetheless, at the risk of seeming to "expound the obvious", it will be profitable to examine the "loss of status" clause independently to see whether it contains internal evidence of the intent of Congress and to see to what extent that internally evident intent dovetails into the intendment of Section 8(d) as a whole.

The loss of status clause reads:

> ". . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act.

as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The reference to Section 8 is to 29 U. S. C. Sec. 158 which Section specifies the employer conduct which constitutes unfair labor practices (Subsection (a)) and the union conduct which constitutes unfair labor practices (Subsection (b)) the remaining Subsections (c) and (d) being largely definitive of matters under (a) and (b). The reference to Section 9 is to 29 U. S. C. Sec. 159, which Section deals with representatives and elections. The reference to Section 10 is to 29 U. S. C. Sec. 160 which Section specifies the procedure for the prevention and redress of union and employer unfair labor practices.

It is immediately evident from the language that Congress has set up a standard of conduct for employees which is temporal and quantitative and in no wise qualitative. Qualitative language was not wanting if the legislature desired to use it; such language appears in the sentence immediately preceding which speaks of contract modifications effective prior to reopening dates. It would have been no onerous task to describe the standard of conduct by its objective; the Board itself (R. 348) has done quite well with its phrase "strikes to terminate or to secure a modification or interpretation of a collective bargaining contract". Or it might have been most simply stated that one who struck in violation of the Section lost status. But the legislative draftsmen in fact chose the temporal, quantitative standard of conduct and their choice of words is at least some evidence that they meant to adopt a temporal standard rather than the standard of purpose.

Again, the language goes out of its way to embrace the entire universe of employees who strike during the renegotiation period. The use of the word "any" instead of the indefinite article "an" or the unarticled plural, signifies a

purpose to bring within the ambit of the clause all employees regardless of the relationship in which they stand to the dispute at hand.

Not only is the notion of universality attached to the word "employee"; that word is defined by Section 2(3) of the Act to include

> ". . . any individual whose work has ceased . . . because of any unfair labor practice, . . ."

It is therefore plain that the universe connoted by the word "any" comprehends those whose work has ceased because of unfair labor practices. Evidently the "loss of status" clause was drawn with this very definition in the congressional mind for it limits the scope of "employee" to one employed by a particular employer which Section 2(3) requires be done by explicit statement if the contrary construction is not intended.* Express rejection of one of the implications of a statutory definition is fair evidence of deliberate retention of what remains.

There is, moreover, a further note of universality in the choice of the unqualified word "strike". That word is a word which the amending Act itself defined as follows (Sec. 501):**

> "When used in this chapter—(2) the term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

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* The text, so far as material is:

"Sec. 2. When used in this Act—

(3) The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . ."

** See "Statutes Involved", *supra*, p. 4.

That, of course, is definition in depth; cumulating upon a known idea its cognate applications. In the quoted section, the only thing accomplished by the repetition of the word defined is the addition of the notion of universality through the use of the adjective "any" which expressly negates distinctions of kind or quality.* That Section 501 was geared specifically into the renegotiation provisions of Section 8(d) to broaden the latter is quite evident from the parenthetical inclusion of "no-contract-no-work" strikes. That Section 501** comprehended strikes qualitatively is also evident from the Section immediately following, Section 502, wherein some, but not all, "safety strikes" are withdrawn from the purview of Section 501.†

Thus, considering language alone we would at this point, to sustain the decree below have to assume that Congress made three distinct errors:

1. The use of the temporal rather than the qualitative standard of conduct.

2. The choice of the word "employee", without qualification, and its universalization.

3. The universalization of the word "strike".

While the independent occurrence of any one of those "errors" is understandable, the concurrence of all three in a single nominative clause of a single sentence is—if they were "errors"—highly improbable. Rather the concurrence of all three very strongly suggests that we are not

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* *McMurray* v. *Brown*, 91 U. S. 257.

** See "Statutes Involved", *supra*, p. 5.

† The text, so far as material, is

"Sec. 502. * * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.":

The reasoning of the majority holding would, apparently, permit a "safety strike" by employees not themselves exposed to the danger.

dealing with errors at all but that we are dealing with a deliberate design of Congress to still the winds of controversy from whatever quarter they blow during renegotiation. That is the reason why they speak of "any" employee and "any" strike and use a temporal frame of reference.

How well this conclusion fits in with the remainder of the "loss of status" clause will appear upon further analysis, and it will be convenient to commence this analysis with the observation that while Congress in this clause appears to have taken a measure adequate to protect its renegotiation scheme against interference from any source, it has been painfully careful not to go a single step beyond eliminating the interference. It does not declare that a strike is unlawful or that it is an "unprotected activity" merely because the strike takes place within the renegotiation period. It preserves, by highly selective language, the rights of the terminal period striker under Section 7 of the Act and, although it removes the possibility of their affirmative enforcement through Sections 8(a)(1), 8(b)(1), 9 and 10 requires all tribunals other than the N. L. R. B. to accord negative respect to those rights.[1] No penalty is laid upon a terminal period striker save insofar as he voluntarily, by timing his strike so that it complicates renegotiation, has chosen to forego the administrative remedies. His rights against an employer not involved in the particular dispute are preserved. His status is immediately restored on reemployment. His loss of status is automatic and of itself, does not terminate his employment, although

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[1] *Semble* that if the striker lost status for all purposes of the Act there could be no application of principles such as laid down in *Weber* v. *Anheuser-Busch*, 348 U. S. 468. The understanding of the Conference Committee was that an employee would lose rights not only under Secs. 8, 9, and 10 but under the basic Sec. 7 if he struck to support an unfair labor practice (H. Conf. Rep't 54 (Appendix 60)) which would include an "economic" strike in the renegotiation period (Sec. 8(d)(4)).

his employer may elect to discharge him. The "loss of status" clause operates only on the striker's remedies; the denial of the efficacy of the Board's remedies implied by striking is precisely equated with a denial of access to those remedies.

In essence Congress has by the "loss of status" clause provided a device which we know in other branches of the law as an election of remedies. Just as the owner of a chattel may maintain either replevin for its return or trover for its value but may not maintain both, so, within the terminal period, an employee may seek redress of his wrongs by strike or by administrative action—but he must either fish or cut bait, he cannot do both. Unless, of course, he waits out the sixty-day period before striking.

Leaving temporarily the notion of election of remedies, we have observed that the striker's loss of status is not complete in that he retains his rights under Section 7 of the Act. Let us turn now to examine the aspects in which he does lose status, starting with his loss of status for the purposes of Section 9. This section deals with representatives and elections. Loss of status deprives strikers of the right to petition for a determination of representatives; of the rights of respondents to a petition brought by an opposing interest; of the right to be counted members of any bargaining unit determined in such a proceeding; of the right to a listing of their chosen representative on the ballot; of the right to vote.

At minimum, the debarment of strikers from the exercise of such rights indicates that Congress contemplated that the issues at renegotiation time might well involve, in addition to "economic" issues, the issues of representation.[1] And it is not a far cry to the inference that Congress

[1] This is also clear from the provision of Section 8(d) absolving parties from certain duties in the event of an intervening certification.

also contemplated that a strike to force recognition* or a strike by a key group to force the splitting of a unit would be quite as disruptive of its orderly contract renewal scheme as any other variety of strike during that period. Or that a strike by an incumbent union to force a challenger to withdraw its petition would be equally disruptive.**

The language of the "loss of status" clause is broad enough to permit a petitioning union harassed by such tactics, to raise the issue of "loss of status" in a representation case quite independently of whether the employer has discharged the strikers or raised the issue. The employer, protected by his ability to discharge a striker who has lost status under Sections 8 and 10 is certainly not in need of protection through a provision that a striker shall lose status under Section 9. And it was most certainly not the design of Congress in such a proceeding to permit the employer to determine the roster of voters by his power to discharge. The conclusion is inescapable that Congress intended that any disruption, whatever its purpose should cause a loss of status under Section 9. That is why the draftsmen of the Act used terms of universality and adopted a temporal standard in writing the loss of status clause.

We know affirmatively that Congress intended that unfair labor practice strikers were to be denied the right to vote at least in some circumstances. The Conference

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* The Conference Committee specifically disapproved of the practice of permitting recognition strikers to vote, as had been done in the *National Silver* case, 71 NLRB 594 (No. 87), and suggested a change in Board policy. H. Conf. Rep't 33 (Appendix 52); it implemented the suggestion by striking out the clause of the Senate bill requiring the Board to permit unfair labor practice strikers to vote. Id. 49 (App. 59).

** Cf. R. 305, 306 detailing the efforts of complainant union to force withdrawal of Local 318 from the representation case pending at the time of the strike.

Committee responsible for the final text of LMRA struck out of the Senate Bill a clause which would have required the N. L. R. B. to permit a striker to vote if "the strike involved an unfair labor practice on the part of the employer" on the ground that it "would have had the effect of precluding the Board from *changing* its present practice" of permitting unfair labor practice strikers to vote.* The Committee stated the reason** for the desirability of the change thus

> "... the Board's policy should be so to use its powers as to encourage employees and their organizations to use the peaceful procedures under the act instead of resorting to the strike weapon. Such a policy would seem to be more in accord with the stated purpose of the act."

The clause in question also provides for a loss of status in respect of Sections 8 and 10 of the Act. Section 8 specifies the employer and union unfair labor practices which the Board may redress; Section 10 provides the procedure for the redress of the specified unfair labor practices. It is indeed difficult to discern why Congress should deny a terminal period striker his employee status for the purpose of unfair labor practices unless it conceived that he might strike on account of those unfair labor practices. The "loss of status" clause obviously presupposes the commission of unfair labor practices against the striker by the employer or by some contending union.

The fact that both Sections 8 and 10 are linked together in the loss of status clause is significant evidence of such a concept. Had Congress limited the loss of status to disqualification under Section 8 alone, then, arguably, only

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* H. Conf. Rep't 49-50 (Appendix 59).

** H. Conf. Rep't 32, 33 (Appendix 52-53).

unfair labor practices committed against a striker subsequent to the time of strike would not furnish grounds for the Board's remedies. But Congress went out of its way to block the remedy for antecedent unfair labor practices by withdrawing the employee status of the striker under Section 10. The inclusion of Section 10 in the clause is aimed clearly and directly at unfair labor practices committed prior to the strike. The clause presupposes that, at the time of strike, an unfair labor practice had been committed against the striker.

There is nothing in the loss of status clause which suggests a distinction between the antecedent unfair labor practice which is related to the strike and the antecedent unfair labor practice which is unconnected with the strike. Such a distinction would seem from a practical viewpoint to be an illusory one, for once an unfair labor practice had been committed, he who wished to strike would always be in a position to strike to remedy it.* Moreover there is nothing to prevent the calling of an unfair labor practice strike and the achievement of one or more contract objectives in the settlement of that strike.

The latter was actually attempted in the case at bar in the following framework: The existing contract contained an arbitration clause (R. 259) applicable to discharges (R. 261); at the time of strike there was pending a demand to modify this arrangement so that the arbitration should precede the discharge (Demand 2, Resp. Ex. 3, R. 265, in evid. R. 74); although the strikers could have compelled arbitration of the Ciccone discharge under the existing

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* In a strike of mixed motivation, it would have to be demonstrated that the strike would have occurred even if the unfair labor practice had not been committed, a demonstration obviously impossible save in very unusual circumstances. *NLRB* v. *Barrett Co.*, 135 F. (2nd) 959, 961-962; *NLRB* v. *Remington Rand, Inc.*, 94 F. (2nd) 862, 872.

contract,[1] they did not (T. Ex. Finding R. 305). Instead the striking union leadership demanded, on the day following the calling of the strike, the reinstatement of Ciccone stating that it was "the only issue at the moment" (R. 304) and protesting "* * * why didn't you fire him through your arbitration procedure?" (R. 46).

But if we assume, *arguendo*, that a distinction so illusory in practice can be made, so that the loss of status affects only the antecedent unfair labor practice unconnected with the strike, then we must inquire why the loss of status clause was enacted at all. For the strike of the incumbent bargaining agent designed to alter working conditions—the economic strike, so-called—is by Section 8(d)(4) prohibited during the 60-day period as an unfair labor practice and Congress recognized that

> "* * * obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."*

Can it be that Congress, having mistakenly adopted a temporal standard, mistakenly interdicted "any" employee and mistakenly applied the clause to "any" strike has also mistakenly enacted an unnecessary sanction, a sanction which achieves nothing not achieved by the remainder of Section 8(d)? Especially when it was so conscious of the lack of necessity of specifying a penalty for those who supported unfair labor practices that it struck out of the

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[1] The strikers, other than Ciccone, were not discharged until the strike had been in progress for a month.

* H. Conf. Rep't 40 (Appendix 56-57). The Conference Committee deleted specific provisions of the House Bill depriving employees who supported unfair labor practices of the protection of the Act repeatedly asserting that they were unnecessary and citing *Thompson Products*, 72 NLRB 150; op. cit. pp. 38-39, 42, 54, 55, 59 (Appendix 54-55, 58, 60, 61-62).

House Bill specific provisions to that effect?* Was it by oversight that the "loss of status" clause was left in the final bill when co-terminous (as the Board would have it) provisions of the House Bill were deleted as unnecessary? Or is it a sounder inference that Congress left the "loss of status" clause in the final bill because it accomplished a purpose which was not accomplished by declaring a terminal economic strike to be an unfair labor practice and thereby rendering the immunities of the Act unavailable to the participating strikers?

Why is it that a Congress which, in the provisions immediately preceding the "loss of status" clause, has with fine discrimination, recognized distinctions between "employees" and "labor organizations" in imposing duties on them, and recognized distinctions between representatives privy to the contract and those not in privity, finds it necessary to turn upon the individual employee—and turn upon him with a blunderbuss belled by words of universality and hair-triggered by a temporal standard to render him *hors de combat* in the arena of the NLRB?

The world of industrial relations is no flat earth composed of single, internally cohesive unions versus single employers. It is respectfully submitted that the Congress realized that the stresses of contract renegotiation are often not merely bilateral but multilateral** and that human

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* See footnote immediately preceding.

** At the time of the enactment of the Taft-Hartley Act, the Bureau of Labor Statistics was using the following categories of strike issues (Monthly Labor Review, May 1947, Vol. 64, No. 5, p. 795):

Wages and hours: wage increase; wage decrease; wage increase, hour decrease; wage decrease, hour increase; other.

Union organization, wages and hours: recognition, wages and/or hours; strengthening bargaining position, wages, and/or hours; closed or union shop, wages, and/or hours; discrimination, wages and/or hours; other.

nature, the general law of contract and the "contract bar" doctrine of the Board combine to concentrate in the terminal period the incidence and intensity of inter-union rivalry and intra-union friction. Congress therefore realized that an enactment which, by making a strike designed to accomplish contract changes an unfair labor practice, deprived economic strikers, and them alone, of the protections of the Act was not enough to assure orderly resolution of the questions attendant upon contract renewal in the manner provided by the statute. It had to go further.

It had to protect the incumbent bargaining agent against its own internal pressures—its rival political factions which might seek to usurp hegemony by striking in defiance of the leadership. It had to protect the employer against the feigned "spontaneous" walkout* connived at by the existing leadership of the incumbent but disavowed by that leadership, and presenting an almost insuperable barrier to legal proof. It had to protect the incumbent against the challenging union which might seek to divert loyalty by diverting the issues through strike. It had to protect the challenger against the incumbent which might seek to unify the loyalties of the employees through a strike, or force the challenger to withdraw or modify a representation petition.** It had to extend these protections to those who in good faith obeyed the Congressional

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Union organization: recognition; strengthening bargaining position; closed or union shop; discrimination; other..

Other working conditions: job security; shop conditions and policies; work load; other.

Interunion or intraunion matters: sympathy; union rivalry or factionalism; jurisdiction; union regulations; other.

* Illustrated by the strike involved in *U. S.* v. *Int. Union, United Mine Workers*, 177 F. (2nd) 129, cert. den. 338 U. S. 871.

** Note that in the case at bar the strike objectives included withdrawal of a rival petition (R. 305, 306).

mandate and to those who, in orderly fashion, sought the resolution of the representation questions attendant upon renegotiation through the administrative measures provided by Congress.

The conclusion that Congress by the "loss of status" clause intended to go beyond disqualification for what might be called "contract items" and reach all forms of disruption, whatever the source and whatever the reason is strongly buttressed by its legislative history. The "loss of status" clause originated in the Senate (S. 1126) where it was in immediate juxtaposition to the paragraph requiring the continuance of existing contract conditions (the two sentences intervening in the Act as passed are mutations of the House proposal requiring a superseding bargaining agent to attorn under the existing contract for its unexpired term). But S. 1126 also made breach of a collective contract a specific unfair labor practice.* The "loss of status" clause therefore would have been completely useless unless it were intended to reach conduct not provably violative of the contract as it might be extended in time by section 8(d); conduct, for example, like a strike which is affirmatively permitted under the contract** or conduct like a recognition strike.

Now the mechanism provided by Congress to meet these demands of equity—the "loss of status" clause—is not at all penal in character; the availability of remedies is merely made contingent upon their use to the exclusion of strikes. It provides that he who strikes shall thereafter

* This provision was not eliminated until the bill was in conference. The Conference Committee eliminated it for the reason that contract litigation should be the province of courts and arbitrators. H. Conf. Rep't 41, 42 (Appendix 57).

** *E. g.* under the contract between General Motors and UAW-CIO a strike over production standards is permissable. Vol. 5 CCA Labor Law Reporter (Service), par. 59,905, Clauses .28, .29, .18, .19, .59, .60.

be disregarded in the working out of the administrative remedies provided for the orderly resolution of renegotiation and representation questions. In effect, Congress says to the employee "You may not ride two horses at once. You may not strike to get rid of an adversary union and at the same time insist on your right to vote it out.* You may not seek by decision of the Board the reinstatement of a dischargee that he may vote in your favor, and at the same time try to overreach the Board's possibly adverse decision by striking for his reinstatement. Don't strike to unseat your leadership while your leadership is debarred from ordering a strike and then, when you are ousted from your job, ask the Board to reinstate you. If you engage in a strike disavowed by your leadership, pursue your strike remedy exclusively and do not expect the Board to unravel the questions of whether or not you were authorized or whether your purpose involved economic, non-economic or mixed objectives. We give you an election of remedies—you may strike or you may pursue your administrative remedies, which are adequate for unfair labor practice questions and representation questions—but your election binds you".

"We have provided for you a set of remedies. You may deem, in particular cases, that a strike is a more efficacious remedy. In such case you may strike; if you win your strike, well and good; we restore your status. But if you lose your strike, you have disrupted the renegotiation process to pursue an inefficacious remedy; this is unreasonable, and we will leave you where we find you. We do not render you "helpless during a set period"**; you have your

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* A practice specifically objected to in the Conference Report, citing with approval the concurring opinion of Board Member Reynolds in *The National Silver* case, 71 NLRB (No. 87) 594, 602. H. Conf. Rep't, 33; (Appendix 52).

** Board majority opinion, R. 350.

choice of remedies, but if the strike is not the efficacious remedy in your circumstances, then it is unreasonable to use it and disrupt renegotiation. If you use the strike weapon thus unreasonably, you may no longer resort to the remedies which you deemed so slow or inadequate that you rejected them in favor of a strike."

Thus considered, the universality, the temporal standard and the scope of status loss are no mere verbal accidents. They are deliberately chosen to achieve a result functionally related to the objective of assuring peaceful contract renegotiation. Congress has not mistakenly said "any strike", "any employee", "sixty day period"; it has not mistakenly enacted a sanction which it said was unnecessary; it has rather enacted a logically coherent protection for those upon whom it has laid the duty to bargain without strike broad enough so that their efforts may not be disrupted for any reason nor by any interest.

It can be said that in doing this Congress subordinated certain protections previously existing against unfair labor practices to the procurement of smooth contract renegotiation. That cannot be denied; it is explicit on the face of the "loss of status" clause; the clause seeks to accomplish nothing else. Congress no doubt balanced the rights of employees under Sections 8, 9 and 10 of the Act against the interests of management, labor and the public in orderly contract renegotiation and decided that the latter interest was paramount at least to the extent of requiring the withholding of strike action for a limited time. But that is just the sort of determination which is peculiarly within the legislative competence. No question of legislative power is raised by a mere requirement that if remedial action of the Board is to be sought, an unfair labor practice strike be delayed until pending economic issues have been resolved by agreement or until it has been determined that a strike

or lockout is necessary to resolve the economic issues. The right to strike is not involved here; merely the availability of remedies not private in character and wholly statutory in their origin* and the legislature might well decide to deny access to such remedies to those who insisted upon compounding the already complex economic issues of renegotiation by adding the more insoluble issues of unfair labor practice strikes and recognition strikes and the like.** It should be emphasized that there is no loss of status unless the strike occurs within the sixty day period; an employee may enjoy both the right to strike and the Board remedy by waiting out the prescribed time.

Still examining the language of the "loss of status" clause, let us observe that Congress may have had an additional objective in mind in using a temporal standard. Such a standard is crisp and clear—its limitations are readily ascertainable by those expected to observe it—average employees. On the other hand, the standard of conduct posed by the opinions below, even if univocal, is one presenting a host of imponderables, fact questions, law questions and credibility questions difficult enough for the employer to resolve but hopelessly beyond the informational limitations,† the legal acumen and the general ability of those charged with observing the standard in the first instance to determine. The latter standard is pregnant with the possibility of completely defeating the Congressional

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* *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 48; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

** The tendency of representation questions to inhibit settlement of economic issues was the subject of comment in *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 42, and *Virginian Ry.* v. *System Fed. No. 40*, 300 U. S. 515, 545.

† For a case wherein employees struck in the honest but mistaken belief that a fellow-employee had been discharged for union activity see *NLRB* v. *McCatron, d. b. a. Privo Valley Lbr. Co.*, CA-9 216 F. (2d) 212; cert. den. 348 U. S. 943.

policy by the drumming up of non contract strike issues, by the feeding of partial truths or other misinformation to employees—in short by the introduction of "ifs, ands and buts" into the clear language of the Congressional mandate.

The possibility of mischief of this character is enhanced by the fact that one of the recognized unfair labor practices (Sections 8(a)(5), 8(b)(3)) consists of refusing to bargain in good faith. Presumably, under the rulings below, an employee who strikes because of the failure of the employer —and perhaps of the union*—to bargain would be entitled to reinstatement.** Did Congress envision that an average employee would be able to apprehend that the term "refusal to bargain" is a term of art not to be confounded with the notion of refusal to bargain which, as a union man,† he might hold and that he would be able to arrive at a correct conclusion on the reports of his negotiators? Or did Congress deliberately seek to avoid just such uncertainties and "*ex parte* adjudications by strike" by adopting as the standard of conduct the clear phrase ". . . within the sixty-day period . . ."?

In sum, the language of the "loss of status" clause is not at all ambiguous; there is much internal evidence that the breadth of the clause was achieved by language chosen with deliberation to that end; the end is consonant with the pertinent legislative history and there is a functional correlation between its provisions and the objective of ensuring

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* *Cf. Monsieur Henri Wines Ltd.*, 44 NLRB 1310; and *Wallace Corp.* v. *NLRB*, 323 U. S. 248, for illustrations of the type of union conduct in bargaining which could precipitate a strike apart from any act of the employer.

** *NLRB* v. *Remington Rand*, 94 F. (2nd) 862.

† *Cf.* the form of the strike support resolution passed by the membership of the union in "*Matter of Western Union Telegraph Co. (A. C. A.)*, 299 N. Y. 177, 181: "We will take every action necessary to force (the employers) to *bargain in good faith* . . ."

protection for the legitimate claims of all interests during the critical time of renegotiation.

It has been noted above that the Board (R. 348-350) and the learned Court below (R. 368-370), in their respective prevailing opinions found the "loss of status" clause ambiguous by importing into it the concept that Section 8(d) considered as a whole is "limited in scope to the contract modification or termination area" so that the word "strike" does not mean "any strike" as Section 501 says it does; but means instead "strike to modify or terminate a contract".

There is involved in this argument a clear *non-sequitur*. It by no means follows from the premise that Congress in writing the Section as a whole was concerned with the orderly renegotiation of contracts that it sought to prevent only negotiation strikes. To arrive at that conclusion it would have to employ the minor premise that only negotiation strikes interfere with negotiation. That minor is not only obviously untrue; its precise opposite motivated the 74th Congress to enact the Wagner Act* and the 80th Congress to continue it.

But if we accept the rejection of the Congressional definition of the word "strike" and accept also the *non-sequitur* we are still left with a problem: why did Congress deal at all with the employee as an individual? It had already prohibited a strike for contract modification or termination; why put a precisely co-terminous obligation on the individual employee? It is respectfully submitted that the reason for dealing with the individual employee as such was the realization that the employee constituted a problem separate and apart from the problem of the incumbent labor organization. The abolition by the Taft-Hartley Act of the disciplinary features of the closed and union

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* *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 42.

shop destroyed the possibility of control by the incumbent of the acts of the individual employee. Having given the employee power as an individual, Congress by the "loss of status" clause sought to fasten responsibility on him as an individual. For a myriad of reasons the employee might disrupt renegotiation. Some of the reasons might accord with the objectives of the incumbent union; some might not: some might favor a challenging union; some might not: some might be disavowed by the incumbent; some might not. But a strike for any reason would be disruptive: therefore any strike by any employee was embraced in the "loss of status" clause.

The learned Court of Appeals would read the "loss of status" clause as if it read "Any employee who strikes to terminate or modify a contract within the 60 day period shall lose his status * * *". Such a construction carries with it the implication that Congress was amenable to permitting employees to strike for that purpose at any other time. Section 8(d) lays upon the employee as such no obligation to serve notice or to offer to bargain.* But this negative implication flies in the face of the entire purpose of Section 8(d). It is only by reading the "loss of status" clause as referring primarily to strikes permissible at any other time that the clause becomes meaningful.

There is nothing in the general purposes of Section 8(d) which is inconsistent with the broad "loss of status" clause; nor repugnant to it; nor is the result of a literal application of Section 8(d) absurd. Hence there is nothing to call into play the process of interpretation.**

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* For a situation in which the members of the union forced a change in wages without acquiescence of the incumbent union, see *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc.*, 265 F. 397 (D. C. E. D. La. 1920).

** *Unexcelled Chemical Corp.* v. *U. S.*, 345 U. S. 59; *Dameron* v. *Brodhead*, 345 U. S. 322.

The repugnancy which, reading between the lines, disturbs both the Board majority and the Court of Appeals majority is not a repugnancy between the "loss of status" clause and the remainder of Section 8(d); it is a repugnancy between the "loss of status" clause and the so-called "fundamental rights" of Sections 7 and 8 of the Act as enforceable through Sections 9 and 10. But that such a repugnancy was intended to exist is indubitable; for the "loss of status" clause explicitly invades those "fundamental" rights. Such an invasion is not unique.*

A short observation on the facts of the case at bar might well serve to conclude this point. It will be recalled that in August of 1950 a Local 65 of the Wholesale and Warehouse Workers Union instituted an organizing drive at Petitioners' plant (R. 274). On September 7th, prematurely, the incumbent Local 22045 demanded a wage increase of 12½¢ per hour (R. 275). By September 28th, Local 65 had progressed to the point of filing its petition for certification (R. 274). On October 10th, Local 22045 served its 60-day notice (R. 340), and on October 20th it doubled its wage demand and added a demand for a 3% welfare fund (R. 277). At that point the unfair labor practices commenced (R. 278). On October 24th, Local 318, the aided union intervened in the pending representation proceeding of Local 65 (R. 285). On October 23rd, Local 22045 adopted a resolution transferring allegiance to Local 3127 of the Carpenters' Union for the stated purpose of procuring a welfare fund (R. 287). On November 10th, Ciccone was discharged and Local 3127 struck (R. 293-295). On December 13th, Local 318, yielding to picketing of its office by Local 3127, withdrew its claim in the representation proceeding (R. 306). Two weeks later Local 65, for reasons which do not appear, withdrew its petition (R. 306).

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* *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355.

This fact situation, not at all atypical, serves to illustrate the inextricable interrelationship between economic issues, representation issues and unfair labor practice issues. Congress was not so naive as not to know the inextricable character of such issues and the fact that they tend to occur in somewhat the same pattern in the renegotiation period.

But the really remarkable thing about the fact situation is that the striking union prevailed over both the union favored by the employer, Local 318 and the union opposed by the employer, Local 65. Had Local 65 raised the issue of loss of status in the representation proceeding could it not have shown that Local 22045-3127, which had adequate remedy by contract for the precipitating discharge, had nonetheless employed the strike to unify the employees against its peaceful missionary efforts?

Congress had no such shallow ideas of the issues at renegotiation time as the Board majority would have us believe.

II.

Employees are bound by an unlimited no-strike clause even though they strike to protest unfair labor practice where the strike causes related to matters expressed in the contract: a no-strike clause is to be construed to favor industrial peace.

The contract between Local 22045 and the Petitioners was to have terminated on November 30, 1950. The strike occurred on November 10th, some twenty days before its expiration.

The wording of the 'no-strike' clause was:

> "The Union agrees that during the term of this agreement, there shall be no interference of any kind

with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement."

The Court will note the universality of the undertaking revealed by the terms "no interference", "any kind", "any interruptions", "any strike". It would be quite difficult to devise more comprehensive or less ambiguous language.

But the Board, professing to interpret that language in the light of the remainder of the contract finds the particular strike not a breach. It says:

> "In the present situation the strike was in protest of matters and actions not covered or in any respect demanded by the contract—matters which constituted serious violations of the Act by the Respondents. . . . The November 10th strike was, as conclusively shown by the record, a protest against unfair labor practices apart from the terms, meaning and application of the contract and in no manner was an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees."

And the learned Court below follows the Board in somewhat less guarded language:

> "However, since the strike was caused and prolonged by the respondents unfair labor practice, we agree with the Board that it is not prohibited by the strike-waiver clause in the contract. • • • The right of employees to strike in resistance to unfair labor practice by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make

> it clear that strikes caused by the employer's unfair labor practices were included in the prohibition (citation). Unfair labor practices in violation of the Act were in no way covered by the contract. . . ."

Now the conclusion that a strike was caused by conduct violative of Section 8 of the Act, i.e., that the strike was an unfair labor practice strike is irrelevant on the question of whether or not that strike breached the no-strike clause of a contract. For Section 13 of the Act, as amended, provides that

> "Nothing in this Act, except as specifically provided for herein shall be construed so as . . . to affect the limitations or qualification on (the right to strike)."

To hold that a given strike is not within the coverage of a no-strike clause because it resulted from a violation of Section 8 of the Act would obviously be to construe the Act to diminish a limitation or qualification of the right to strike agreed upon by the parties.

The Board recognized this (R. 345, Footnote 8) and disclaimed that it was holding that the involvement of unfair labor practices took the strike out of the contractual coverage. It claimed instead that the "terms and scope of that clause (sic; "the contract"?) itself" were not broad enough to cover a strike "in protest of matters and actions not covered or in any respect demanded by the contract . . ."

Passing by the questionable *rationale* by which the Board reached the conclusion that the coverage of the no-strike clause is limited to strikes to resolve "differences . . . as to the meaning and application" of the words within the four corners of the instrument and accepting the conclusion at its face value we inquire "What were the matters and actions not covered?"

The Board has found them to be (R. 340, adopting R. 313)

> "(a) inducing and encouraging the representative of Local 22045 to agree to substitute Local 318 in its place and stead;
>
> (b) inducing and encouraging the representative of Local 318 to engage in a campaign to displace Local 22045 as the bargaining agent of their employees;
>
> (c) sponsoring, supporting and assisting the organizational campaign of Local 318;
>
> (d) giving financial rewards to employees active in the organizational campaign of Local 318;
>
> (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of Local 318 and to refrain from becoming or remaining members of other competing unions."

And also (R. 316)

> "... discharging Frank Ciccone on November 10, 1950. ..."

The *gravamen* of all of these findings is the attempt to substitute Local 318 for Local 22045.

But each of these "matters or actions" was "covered or demanded"* by the contract. The recognition clause (*supra*, p. 9; R. 254 ¶1(a) excluded Local 318 from achieving recognition during the contract term. The union shop clause (*supra*, p. 9, R. 254 ¶1(a) prevented defections from

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* This peculiar phrasing originated in the Board's attempt to explain away its own *National Electric Products* decision, 80 N. L. R. B. 995. That case held that a strike breached a contract though it was an unfair labor practice strike. The Board now explains that the employer had contracted to commit the unfair labor practice, and in that sense his conduct was "demanded" by the contract.

the membership of Local 22045. A clause (R. 254 ¶1(b) provided for the accretion of new employees to the membership of Local 22045 and the discharge of those failing to join. The dues of Local 22045 were secured by a check-off clause (R. 254-255 ¶3) and a delinquency discharge provision (R. 254 ¶1(b), and were to be segregated as checked off. Membership status in Local 22045 was expressly made the subject of arbitration (R. 254 ¶2). Whether there was "proper cause" for the Ciccone discharge was reviewable in arbitration (*supra*, p. 10; R. 261 ¶22). The arbitrator was empowered to deal with a threatened as well as with an actual breach of contract (*supra*, p. 10; R. 259 ¶19) and his powers encompassed the question of whether a lockout (and presumably a threat of lockout) had occurred (*supra*, p. 10; R. 255 ¶¶6, 7).

Thus, even accepting the Board's unsupportable narrowing of the "no-strike" undertaking and its own findings of fact we are forced to the conclusion that every one of the six stated causes which cumulatively (R. 342), it is found, resulted in the strike involved matter on which the parties had made specific contractual commitments. The legal conclusion of the Board that the "terms and scope" of the no-strike clause were not broad enough to cover the strike therefore falls—and on its own premise.

It is abundantly clear that what has happened here is that the Board has permitted its judgment to be colored by its conclusion that the stated conduct constitutes unfair labor practices. If has not judged that conduct by the contractual language. It has judged that conduct by applying the standard of whether or not the conduct breached the Federal Act. This is precisely contrary to the statutory canon of construction set out in Section 13 of the Act.

The rejection of the contract defense therefore must fall—even on the Board's own premises. We noted, how-

ever, the questionable character of the premise that the coverage of the no-strike clause should be narrowed so that it related only to strikes arising out of differences as to the meaning and application of the words within the four corners of the instrument. Originally counsel had anticipated a demonstration that, by the law of New York, the premise was erroneous. However, the division of the Court in the *Westinghouse* case* subsequent to the grant of certiorari in the case at bar throws doubt upon the applicability of New York law to the interpretation of a labor contract affecting interstate commerce. Counsel will therefore essay a demonstration that the premise is erroneous whether the New York law be applied or whether Federal law be applied.

The law of New York on the issue is clearly contrary to the construction of the contract which forms the Board's premise. In *Matter of Western Union Telegraph Co. (A. C. A.)*,** the New York Court of Appeals construed a union undertaking

> ". . . that there shall be no strikes or other stoppages of work during the life of this contract"

as barring a refusal by employees to handle "struck traffic". The purpose of the strike—to aid fellow unionists in a dispute with their respective employers (some were employed by Western Union)—was quite "apart from the terms, meaning and application of the contract and was in no manner an attempt to circumvent the arbitration provisions of the agreement or an effort to alter other provisions and guarantees" (Board Op. R. 345). The claimed

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* *Assoc. of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U. S. 437, 99 L. Ed. (Advance, p. 368).

** 299 N. Y. 177, 86 N. E. 900. Conway, Dye, Bromley and Lewis, J.J.; Dissenting, Desmond and Fuld, J.J. and Loughran, Ch. J.

justification for the refusal to handle struck traffic was a custom of the industry to that effect. The arbitrator found that such a custom existed and ordered reinstatement with back pay. The Court of Appeals vacated the award. Neither in the prevailing nor in the dissenting opinion is there any suggestion that the scope of the no-strike clause was limited to the matters settled by the agreement or that the strike was validated because no contractual undertaking (other than the no-strike clause itself) was involved.

But if the New York law does not control as such, or as Federal law operating by consent of Congress, it becomes necessary to examine what Federal law there may be. There is a dearth of Federal decisional law on the subject which makes it necessary to examine the subject *de novo*.*

To begin with, the character of the conduct as offensive to the National Labor Relations Act is completely irrelevant to the construction of the no-strike clause of a contract. As previously observed, Section 13 of that Act precludes a construction of a contractual limitation founded upon the statutory concept of unfair labor practices.

The Court of Appeals seems to suggest (R. 366-367) the existence of a non-statutory notion of unfair labor practices which underly a "fundamental" right to strike. It would seem sufficient to remark, in answer, that legal history discountenances the suggestion; for the terminology did not exist prior to the statutory enactment. Teller says:

> "Strikes or other activity carried on to protest anti-union discrimination on the part of an employer have . . . received scant favor in the cases, probably

* The utility of *N. L. R. B.* v. *Rockaway News Supply*, 345 U. S. 71 as a solvent on this question is impaired by the offer of proof element and the arbitration award element therein.

> because the common law recognizes no right on the part of labor unions and organizing employees to be free from interference, restraint or coercion by employers."*

The Board, recognizing the limitations of Section 13 and being unable otherwise to characterize the employer conduct flies to an extreme canon of construction. It says (R. 344) that a no-strike clause unlimited on its face is, nonetheless, limited to an undertaking not to strike except over "difference . . . as to the meaning and application of (the) agreement, including questions of meaning, interpretation, operation or application of any clause of (the) agreement or any breach or threatened breach of (the) agreement."

In substance, an unlimited no-strike clause is to be construed not by its own broad language but merely as a surrender of the right to seek by strike a favorable interpretation of the written terms of agreement. In a sense the Board writes a Statute of Frauds with a corollary parole evidence rule into labor agreements. The substance of the Board's canon appears to be that, since the no-strike undertaking is in derogation of the right to strike,** the employees are concluded only as to those subject matters specifically set out in the agreement.

It is important to note that the Board asserts no repugnancy between the "no-strike" clause and the balance of the contract; no reservation of the right to strike implied from

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* Labor Disputes and Collective Bargaining §89, Vol I, p. 263. The conference committee did not regard the right to strike to protest unfair labor practices as sufficient justification for the retention of the right to vote (H. Conf. Rep't 49, Appendix 59).

** A reflection of the early philosophy of the Board that any limitations on the right to strike "would no doubt be unconstitutional", Second Ann. Rep't, p. 4. The House Conference Report on the Taft-Hartley Act took care to assert that the "right to strike is not an unlimited or unqualified right." H. Conf. Rep't 59 (Appendix 63).

some other language or from the inconsistency of some conduct required by other clauses. Nor is any ambiguity in the language employed in the "no-strike" clause asserted.

Rather the naked concept of derogation of the right to strike is used to limit the undertaking. While it might appear that a commitment not to engage in any strike or work stoppage and a commitment against interference of any kind or interruption or slackening of production of work by any member would seem to satisfy even the "derogation" test, it is respectfully submitted that the "derogation of the right to strike" canon of construction of no-strike clauses is, if Federal law be the criterion, flatly opposed to the major objectives of Federal legislation.

For the very design of the Taft-Hartley Act is to prevent the interruption of commerce by procuring voluntary waivers of the right to strike. That is another way of saying that consensual derogation of the right to strike is the major purpose of that Act. It follows that a no-strike clause should be construed not by narrowing it but by broadening it to include the whole right to strike except insofar as the union has expressly or by fair implication reserved the same. The right of some people to strike cannot be exalted over the right of all the people to the free flow of commerce.

It must not be forgotten that a labor contract is no longer a wholly private agreement. It is an instrument of commerce entered into in pursuance of a public duty laid upon employer and employee; it is affected with a public interest and is to be construed, in that interest *in favorem pacis*.

Not only is the Board's canon of construction wrong, but its result is wrong judged by the known facts of industrial relations. The argument of the Board implies that the substantive items of the contract furnish the measure of the no-strike obligation. But what of those elements of

the bargain not expressed in the contract? In the great majority of contract negotiations one or the other of the parties makes demands which, before the final settlement, are withdrawn, modified or transmuted.* Can the Newspaper Guild, for example, demand seniority in the editorial department of a newspaper, allow its demand to be transmuted into a severance pay clause and, after the contract has been signed strike for seniority? Or could the union in the case at bar have demanded a "broad form" arbitration clause coupled with an offer of the "no-strike" clause as it appears in this record, permit itself to be bargained down to the limited form of arbitration clause now before the Court and, after signing, strike for pensions?

We need not discuss whether, in some case there might arise a situation in which the "no-strike" clause of the contract might validly be modified by other parts of the instrument. It is sufficient that no such situation exists herein. Neither the arbitration clause nor the scope of the substantive undertakings furnish a reason for qualifying a clause which the Trial Examiner described as containing "no express qualification".

While there appears to be a dearth of decisional law construing "no-strike" clauses, courts in various cases have held that the mere concerted refusal to render service under agreed conditions of work, without specific reference to a no-strike clause, was a breach of contract, the most prominent of these cases being the *Sands Mfg. Co.* case.**

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* See the reference in *N. L. R. B.* v. *Rockaway News Supply*, 345 U. S. 71 to the offer of proof as to withdrawal of a demand.

** *NLRB* v. *Sands Mfg. Co.*, 303 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. For a New York case holding that a threatened strike may be enjoined as a breach even though the purpose is to alter a condition of employment not stated in the contract nor shown to have been expressly the subject of negotiation see *Assoc. Flour Haulers* v. *Sullivan*, 168 Misc. 315, 5 N. Y. S. 2d 982. The latter case recognizes that a labor contract is a mere skeleton which leaves much unsaid.

wherein it was held that such conduct justifies discharge. While it is true that the work stoppage in that case was designed to secure a change of the contract conditions—a seniority question—it is quite clear that the gravamen of the breach lay not in the attempt to secure a change but in the failure to work under the agreed conditions while the change was being sought. This would seem to imply a canon of construction of "no-strike" clauses to the effect that, the employees having stated in their contract the conditions under which they will work, they will work thereunder unless they *expressly* reserve the right to cease work under stated circumstances.

But a further question exists. Can a contract be validly written which will preserve any part of the right to strike during the terminal period of a contract? The Board itself sought and obtained an injunction against the United Mine Workers' celebrated "able and willing" and "memorial period" clauses upon the ground that such clauses violated the obligation under the 4th duty paragraph of Section 8(d) to continue a contract in force *without strike* during a terminal period. The evidence showed that the purpose of the strike was not to obtain contract changes but to prevent demoralization of the industry by a fall in the price of coal because there was too much coal above ground. But no nice distinction between contract objectives or non-contract objectives appeared either in the evidence or in the decree.* Surely the Board is not suggesting that we bargain for a form of contract which had been held to be an unfair labor practice?

It is respectfully submitted that the rejection of the breach of contract defense is supportable neither on the facts as found nor on the law.

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* *Penello* v. *Int. Union U. M. W.*, 88 F. Supp. 935.

Conclusion.

The decree should be reversed insofar as it directs reinstatement of the strikers and back pay, and the matter remanded to the Circuit Court of Appeals for the Second Circuit with instructions to expunge the stated directions.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Petitioner.

Dated New York, N. Y.,
August 20, 1955.

APPENDIX.

Abstracts from Conference Committee Report on LMRA 1947

HOUSE CONFERENCE REPORT NO. 510 ON H. R. 3020, 80TH CONG., 1ST SESS.

[30] TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Both the House bill and the Senate amendment in title I amended the National Labor Relations Act in numerous respects.

In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and entirely one-sided. The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter constitute an indictment of all employers. At the same time the [31] Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be "two-sided." The conference agreement adopts the provisions of the Senate amendment in this respect.

* * * * * * *

[32] (3) *Employee.*—The House bill changed the definition of "employee" contained in the existing law in several respects:

(A) Under the existing definition of "employee" the Board has treated employees striking for wages, hours, or working conditions differently from employees striking because of an alleged unfair labor practice on the part of the employer. In the former case the Board has said that the individual striker retains his status as an employee under the act only until he is replaced, whereas in the latter case the Board has said that the individual striker retains his status as an employee so long as the labor dispute is "current". This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. The House bill in the definition of employee provided in specific terms that these two classes of striking employees should be treated in the same fashion, i. e. they were to retain their employee status until replaced.

* * * * * *

[33] (C) The conference agreement does not contain the specific provisions of the House bill dealing with the status of "unfair labor practice" strikers. Since the different treatment of unfair labor practice strikers and economic strikers is simply a practice of the Board which the Board can change within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term "employee."

In the *National Silver Company case* (71 N. L. R. B. 87) (1946), at least one member of the Board thought that the Board's policy should be to so use its

powers as to encourage employees and their organizations to use the peaceful procedures under the act instead of resorting to the strike weapon. Such a policy would seem to be more in accord with the stated purpose of the act.

[34] The Senate amendment also required, as part of the bargaining procedure, that no party to any collective bargaining contract should terminate or modify the contract unless the party desiring such ter- [35] mination or modification (A) served a written 60-day notice of the proposed termination or modification on the other party, (B) offered to meet and confer with the other party with respect thereto, (C) notified the Federal Mediation and Conciliation Service (a new independent agency later discussed) within 30 days after such notice of the existence of the dispute, if agreement had not been reached by that time, and (D) continued in full force and effect, without strike or lock-out, all the terms and conditions of the existing contract for a period of 60 days after the notice of desired termination or modification was given or until the expiration date of the contract, whichever occurred later.

An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act.

The conference agreement, like the Senate amendment, does not contain a definition as such of "collective bargaining", but does, in section 8 (d) of the amended Labor Act, contain provisions similar to those of the Senate amendment, with certain clarifying changes. One of the important changes is the inclusion of a provision indicating that the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. In addition, the conference agree-

me . omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.

. . . . . .

[38] Rights of Employees

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First*, it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second*, it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.*, 149 Fed. (2d) 987) (1944).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other im- [39] proper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company case* (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage-stabilization laws. Again, in the *Scullin Steel case* (65 N. L. R. B. 1294) and in the *Dyson case* (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products case* (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference

committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board, proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that em- [49] ployees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously per-

sons who engage in or support unfair labor practices will not enjoy immunity under the act.

* * * * * * *

[41] "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining [42] agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

UNFAIR LABOR PRACTICES OF LABOR ORGANIZATIONS

Both the House bill and the Senate amendment defined, in a new section 8 (b) of the National Labor Relations Act, unfair labor practices on the part of labor organizations and their agents. The House bill also made the unfair labor practices described unfair labor practices on the part of employees.

Under the House bill the following unfair labor practices were set forth:

(1) Intimidating practices to interfere with the exercise by employees of rights guaranteed in section 7 or to compel or seek to compel any individual to be a member of a labor organization.

(2) To refuse to bargain collectively with the employer.

(3) To call or participate in any strike or other concerted interference with an employer's operations, an object of which was to compel the employer to accede to the inclusion in a collective bargaining agreement of matters which under the House bill were

not treated as within the proper scope of compulsory bargaining.

Under the new section 8 (b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12 (a) (1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12 (a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act. Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8 (b) (1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. Furthermore, since in section 302 (b), unions are made suable, unions that engage in these practices to the injury of another may subject themselves to liability under ordinary principles of law. Then, too, under the provisions of section 10 (k) of the conference agreement the Board can seek a temporary [43] injunction enjoining these practices pending its decision on the merits.

[49] (7) Under the House bill, in section 9 (f) (7), it was provided that no election could be directed in any bargaining unit or any subdivision thereof within which, in the preceding 12-month period, a valid election had been held, except upon a petition by employees requesting "de-certification" of a representative. The Senate amendment, in section 9 (c) (3), contained a similar provision without the exception. The conference agreement adopts the provisions of the Senate amendment. The Senate amendment also contained a provision that employees on strike who were not [50] entitled to reinstatement should not be permitted to vote unless the strike involved an unfair labor practice on the part of the employer. This provision is also included in section 9 (c) of the conference agreement with the "unless" clause omitted. The inclusion of such clause would have had the effect of precluding the Board from changing its present practice with respect to the treatment of "unfair labor practice" strikers as distinguished from that accorded to "economic" strikers.

(8) Under the House bill, in section 9 (f) (8), it was provided that if a new representative were chosen while a collective bargaining agreement was in effect with another representative, certification of the new representative should not become effective unless such new representative became a party to such contract and agreed to be bound by its terms for the remainder of the contract period. Since the inclusion of such a provision might give rise to an inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued, it is omitted from the conference agreement.

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[54] (8) In section 10 (c) both the House bill and the Senate amendment incorporated language with respect to the Board's remedial orders in cases of unfair

labor practices by labor organizations. The House bill provided that, in addition to ordering respondents to cease and desist from unfair practices, the Board could order employers to take affirmative action to effectuate the purposes of the act, including reinstatement with back pay for employees (a provision appearing in the present act), and could also order representatives and employees to take affirmative action, and deprive them of rights under the act for not more than 1 year. The Senate amendment did not contain the provision specifically authorizing the Board to deprive representatives and employees who engage in unfair practices of rights under the act, but did contain a provision authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees.

The House bill, by implication, limited the Board in its choice of remedial orders in cases of unfair labor practices by representatives not involving back pay, by specifying but one type of order that the Board might issue. The conference agreement therefore omits this provision of the House bill. As previously stated, employees are subject to the prohibitions of section 8 (b) only when they act as agents of representatives, but in these and other cases, when they are disciplined or discharged for engaging in or supporting unfair practices, they do not have immunity under section 7. The language in the Senate amendment without which the Board could not require unions to pay back pay when they induce an employer to discriminate against an employee is included in the conference agreement.

* * * * * *

[55] (10) The House bill also included, in section 10 (c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause.

The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N. L. R. B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

* * * * * *

[58] The House bill, in a new section 12 of the National Labor Relations Act, set forth certain activities which were treated as unlawful. Persons engaging in them were made subject to civil suit for damages on the part of persons injured thereby. It was provided that the Norris-LaGuardia Act should be inapplicable in respect of any action or proceeding involving any such activity, and any person who was found to have engaged in any such activity was to be subject to deprivation of rights under the act to the same extent as a person under the House bill found to have engaged in an unfair labor practice under section 8 (b) or 8 (c).

The activities which were treated as unlawful under this section were:

* * * * * *

[59] (3) Authorizing, participating in, or assisting any sympathy strike, jurisdictional strike, monopolistic strike, sit-down strike, or illegal boycott, or any strike

to compel an employer to accede to featherbedding practices, or any strike having as an objective compelling an employer to recognize for collective bargaining an uncertified representative or having as an objective the remedying of practices for which an administrative remedy was provided by the act, or having as an objective compelling an employer to violate any law.

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Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8 (b) (1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10 (c). Furthermore, under section 10 (k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits.

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Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede or diminish in any way the right to strike. Under the House bill, in section 12 (e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The

Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment.